STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY M. MCCOY and ROBIN LABARGE MCCOY,

Plaintiffs-Appellees,

v

LAMOTTE COACHLIGHT CORPORATION,

Defendant-Appellant,

and

SCHULT HOMES CORPORATION,

Defendant.

UNPUBLISHED
December 6, 2007

No. 272440
Sanilac Circuit Court
LC No. 04-030064-CK

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant Lamotte Coachlight Corporation appeals as of right from the judgment in favor of plaintiffs entered following a bench trial on damages only. We affirm.

I. Facts and Procedural History

This action arose out of the defective construction and installment of plaintiffs' manufactured home and other related construction required under the contract. The contract between plaintiffs and Lamotte included the purchase of a Schult modular home manufactured by defendant Schult Homes Corporation for $105,703, and Lamotte agreed to install or construct various items associated with the home. Shortly after moving in, plaintiffs noticed numerous major defects with the home and contacted Lamotte and Schult in an effort to have them remedy the defects. After the defects were not remedied to plaintiffs' satisfaction and Lamotte asserted that it was not responsible for the defects, the instant action was filed against Lamotte and Schult for breach of contract, breach of an implied warranty of merchantability, and breach of an implied warranty of fitness for a particular purpose. Schult was later dismissed with prejudice as a result of a release arising after Schult filed for bankruptcy.

Instead of answering, Lamotte moved for summary disposition under MCR 2.116(C)(7), asserting that plaintiffs' claims were barred by the one-year contractual limitations period. The trial court denied the motion, concluding that a genuine issue of material fact existed regarding

when the breach of contract occurred. About a year and one-half after the complaint was filed, Lamotte filed its answer and affirmative defenses, asserting that the action was barred by the one-year contractual limitations period and by the release of Schult and its successor. Ultimately, the trial court granted plaintiffs' motion to strike the answer because it was untimely. As a result, the trial was limited only to the issue of damages.

At trial, plaintiffs' licensed residential builder testified to the many defects associated with the home and the related construction. He obtained $72,660 in bids to remedy the numerous defects with the home and the related construction, and there was testimony that Lamotte failed to install an air conditioner for $2,100, as required under the contract. Plaintiffs' licensed realtor testified that the home was unsalable in its current condition. Lamotte did not present any witnesses. Ultimately, the trial court awarded $74,660 in damages. This appeal followed.

II. Analysis

Lamotte first argues that the trial court erred by failing to allow it to file its untimely answer and affirmative defenses. We agree that the one-year contractual limitations period defense was not untimely, but disagree that any plain error[1] occurred concerning the trial court's refusal to allow Lamotte to file its untimely answer and affirmative defense of release. Resolving this issue involves interpretation of a court rule, which is a question of law reviewed de novo. *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 142; 662 NW2d 94 (2003).

MCR 2.108(A)(1) requires a defendant to file "an answer or take other action permitted by law or these rules within 21 days" of being served with the complaint. In lieu of filing an answer, Lamotte moved for summary disposition under MCR 2.116(C)(7), based on the one-year contractual limitations period. That motion was denied, so under MCR 2.108(C)(1), Lamotte had 21 days after notice of the denial to file a responsive pleading. Lamotte filed its answer and affirmative defenses[2] exactly one year after the motion was denied.

However, Lamotte's affirmative defense based on the one-year contractual limitations period was preserved and did not have to be asserted in a responsive pleading later filed because it was asserted in a MCR 2.116 motion before filing a responsive pleading. MCR 2.111(F)(2)(a). The same rule does not apply to the answer so it was untimely because it was filed more than 21 days after notice of the denial of the motion for summary disposition. MCR 2.108(C)(1).

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[1] For the first time on appeal, Lamotte argues that the trial court abused its discretion under MCR 2.108(E) by not extending the time in which to file an answer and affirmative defenses and abused its discretion under MCR 2.118(A)(2) by not granting leave to amend its responsive pleadings. Accordingly, those arguments are unpreserved because they were neither raised in and nor decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). As a result, relief is not available absent plain error affecting substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

[2] MCR 2.111(F)(3) requires an affirmative defense to be stated in a party's responsive pleading.

Additionally, the affirmative defense of release was untimely because it was not filed until about three and one-half months after the release was filed with the trial court. Cf. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 647-648; 620 NW2d 310 (2000) (concluding that an affirmative defense had not been waived in light of its discovery after the original responsive pleading had been filed). Accordingly, because the trial court did not err in striking the answer and accompanying affirmative defense of release, that defense was waived and could not be considered. See MCR 2.111(F)(2); *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).[3]

Lamotte next argues that the trial court erred by denying its motion for summary disposition, and denying its affirmative defense following trial, based on the one-year contractual limitations period. The party asserting an affirmative defense normally has the burden of proof. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74; 577 NW2d 150 (1998). A trial court's determination regarding whether a claim is barred by the statute of limitations is a question of law reviewed de novo, *Magee v DaimlerChrysler Corp*, 472 Mich 108, 111; 693 NW2d 166 (2005), as is its decision on a motion for summary disposition, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). "A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000).

As defendant recognizes, under Michigan's version of Article 2 of the Uniform Commercial Code (UCC), UCC—Sales, MCL 440.2101 *et seq.*,[4] MCL 440.2725(2) governs when a cause of action accrues and provides as follows:

> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

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[3] We also conclude that no plain error occurred under MCR 2.108(E), because Lamotte never moved to admit its answer under the court rule, and did not offer any reason for its failure to file an answer in a timely manner. Additionally, no plain error occurred under MCR 2.118(A)(2) because the court rule requires a motion and applies to amended pleadings, and Lamotte did not file a motion or attempt to amend a pleading but rather attempted to file its initial responsive pleading.

[4] The manufactured home, by itself, constituted a good because it is a movable and an identifiable type of good within the definition of goods under MCL 440.2105(1). Further, the predominant purpose of the contract was the purchase of the manufactured home, which cost $82,499 of the total $105,703, while the construction of related projects was merely incidental to the predominate purpose of the contract. Accordingly, the contract is governed by the UCC—Sales. See *Neibarger v Universal Coops, Inc*, 439 Mich 512, 536; 486 NW2d 612 (1992).

Thus, the discovery rule does not apply to this cause of action governed by the UCC—Sales, and a breach of warranty occurs when "tender of delivery is made." Case law from this Court has treated both breach of warranty and breach of contract claims, which plaintiffs pursued here, as governed by the UCC—Sales as accruing when tender of delivery is made. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-378; 532 NW2d 541 (1995). "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." MCL 440.2503(1). When a contract for the sale of goods also involves installation, tender of delivery occurs only when the component parts are fully installed. *Baker v DEC Int'l*, 458 Mich 247, 254; 580 NW2d 894 (1998). Here, if the breach occurred on or before October 28, 2003, the action would have been barred.

In construing the evidence submitted with the summary disposition motion in a light most favorable to plaintiffs, Lamotte failed to meet its burden because it only baldly asserted that the home was set in August or September 2003. Additionally, the home being set on the foundation does not establish that the home was fully installed because the contract involved other construction services, including the building of a garage, the creation of a septic field, and the installation of an air conditioner, that Lamotte did not address. Accordingly, the trial court did not err in concluding a genuine issue of material fact existed regarding the date of the breach, and therefore denying summary disposition.

At trial, testimony indicated that Lamotte employees were working on the home when it was inspected on October 14, 2003 and that they were finished with the installation when plaintiffs moved into their home on either October 30 or 31, 2003. Based on the evidence elicited at trial, Lamotte continued to install the home according to the contractual requirements at least until October 14, 2003, but Lamotte failed to present any evidence to indicate when the installation was complete. At the latest, the installation was completed before plaintiffs moved in on either October 30 or 31, 2003, but there is nothing in the record to indicate whether installation was complete on or before October 28, 2003. Just as importantly, the trial court was free to accept plaintiffs' testimony that they did not have an opportunity to inspect the "final product" until October 30, 2003, when defendant first allowed them to move into the house. Accordingly, no clear error occurred in the trial court's factual findings, and we cannot overturn its decision that the complaint was timely. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992).

Lamotte next argues that the trial court's damage award is erroneous. The parties agreed in the contract to limit damages to the following:

> If any warranty fails because of [sic] attempts to repair are not completed within a reasonable time or any reason attributed to the manufacturer, purchaser agrees, that if purchaser is entitled to any damages against retailer, purchaser's damages are limited to the lesser of either the cost of needed repairs or reduction in the market value of the unit caused by the lack of repairs. In any case retailer will not be required to pay purchaser any incidental or consequential damages.

At trial, plaintiffs' licensed residential builder testified about the bids he obtained to repair the problems with the home, and those bids totaled $72,560, which, in addition to the $2,100 for the air conditioner that was never installed, totaled $74,660. Plaintiffs' licensed realtor opined that the home was unsaleable given its foundation problems. The trial court found both witnesses to be credible and found that plaintiffs had met their burden of proof, and awarded them $74,660 in damages, the lesser cost of repair damages as opposed to the reduction in value.

Lamotte's argument emphasizes that the realtor's testimony should not have been considered because she lacked credibility and her opinion was speculative. However, credibility is ultimately left for the trier of fact, and so we must reject Lamotte's arguments, as they would require us to overturn the factual findings of the trial court that had support in the record. MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray